

**Naples Community Hospital, Inc. and Communications Workers of America, AFL-CIO.** Cases 12-CA-15823 and 12-CA-15872

August 9, 1995

**DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS  
AND TRUESDALE

On June 20, 1994, Administrative Law Judge J. Pargen Robertson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt his recommended Order.

The judge concluded, *inter alia*, that the Respondent violated the Act by discriminatorily refusing to continue to appoint Rickie Zarb to the position of acting supervisor. In so concluding, the judge found that the acting supervisor position was not a supervisory position within the meaning of Section 2(11) of the Act. We agree.<sup>2</sup>

In its brief in support of exceptions the Respondent contends that the acting supervisor position meets no fewer than three statutory criteria. Specifically it urges that the acting supervisor's "complete authority" in the lab means that this individual exercises independent judgment in: (1) assigning and responsibly directing work; (2) adjusting grievances; and (3) effectively recommending discipline. The Respondent also contends that failure to find statutory supervisor status here would leave the laboratory without supervision during the weekends when the acting supervisors are in charge of the laboratory. In this latter connection, the Respondent relies on *Wright Memorial Hospital*, 255 NLRB 1319 (1981), and *Pine Manor Nursing Center*, 270 NLRB 1008, 1009 (1984).

We are not persuaded by the Respondent's contentions that the judge erred in finding that the duties of the acting supervisor appear routine in nature and that Zarb did not perform functions that required independent

judgment. Thus, we note that only one of the Respondent's witnesses, former Laboratory Director Karen Sandrick, testified concerning the alleged supervisory duties of Zarb. As more fully described by the judge, Sandrick testified that the acting shift supervisor had sole responsibility for the lab. Sandrick also referred to certain numbered items listed on the regular shift supervisor's job description as constituting the duties of the acting supervisor, acknowledging that there was no separate job description for the acting supervisor. We find that Sandrick's testimony does not provide a sufficient basis for establishing the three supervisory criteria enumerated above, particularly when certain other credited testimony is considered.

For example, the judge found that Sandrick also testified that the acting supervisor was not responsible for the entire work assignments on that shift and that adjustments in work assignments would be made through the actual supervisor. Similarly, Zarb, whose testimony was fully credited by the judge, testified that the supervisor in charge of the first shift would stay over and handle major incidents in staffing the laboratory. With regard to the matter of effectively recommending discipline, Sandrick described the acting supervisor as a "recorder of the accurate facts" who passed that information on to Sandrick and other levels for review. Sandrick did not testify that the acting supervisor made a recommendation, much less an effective recommendation, on discipline.

Turning to the Respondent's contention that a supervisory finding is necessary here because the acting supervisor is in charge of the laboratory on weekends, we find that the cases relied on by the Respondent are readily distinguishable. In both *Wright Memorial* and *Pine Manor*, *supra*, unlike here, the facilities would have been without supervision during the times in question. In the instant case, the record evidence shows that a nursing supervisor was present in the hospital on weekends. Furthermore, Zarb's uncontradicted testimony is that she consulted with the laboratory director by telephone both about test results to be given to patients and about performing certain tests not ordinarily given during her weekend shift.

On the record evidence and for the reasons found by the judge, as further explained above, we find that the Respondent failed to establish that Zarb was a supervisor within the meaning of the Act and that the Respondent's discriminatory refusal to continue to appoint her to the position of acting supervisor because of her union activities violated Section 8(a)(1) and (3) of the Act.<sup>3</sup>

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule the administrative law judge's credibility resolutions unless a clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

<sup>2</sup> The judge also found merit in the General Counsel's contention that Zarb's activity was protected even if the acting supervisor position is found to be a supervisory position under the Act. We find it unnecessary to pass on this alternative analysis by the judge because we agree that Zarb was not a supervisor under the Act.

<sup>3</sup> We note that, in its brief in support of exceptions, the Respondent concedes that the legality of its treatment of Zarb is necessarily predicated on a finding that the acting supervisor's position was a statutory supervisory position under the Act.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Naples Community Hospital, Inc., Naples, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

*Shelley B. Plass, Esq.*, for the General Counsel.

*William R. Radford, Esq.*, of Miami, Florida, for the Respondent.

*Marilyn W. Haith*, of Greensboro, North Carolina, for the Charging Party.

## DECISION

J. PARGEN ROBERTSON, Administrative Law Judge. This hearing was held on March 23, 1994, in Naples, Florida. A consolidated complaint issued on January 26, 1994. The charges were filed on September 30 and October 29 and amended on December 1, 1993.

All parties were represented and afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Respondent and General Counsel filed briefs. Upon consideration of the entire record and the briefs, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

Respondent admitted that it is a Florida corporation in Naples, Florida, where it is engaged in the operation of a hospital; that during a representative 12 months it received gross revenues in excess of \$250,000 and received goods valued in excess of \$50,000 directly from points outside the State of Florida; and has been at material times, engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I find that Respondent has been at material times an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act).

## II. LABOR ORGANIZATION

Respondent admitted that the Charging Party (the Union) has been at material times a labor organization within the meaning of Section 2(5) of the Act.

## III. THE UNFAIR LABOR PRACTICE ALLEGATIONS

It is alleged that Respondent engaged in violation of Section 8(a)(1), including threats associated with a union organizing campaign and that Respondent has since September 18, 1993, denied an employee the opportunity to act as an assistant supervisor on weekends because that employee joined and assisted the Union.

*A. Nancy Medlen Threatened Employee with Denial of Opportunity to Act as an Assistant Supervisor*

Rickie Zarb testified that Nancy Medlen, acting laboratory director, called Zarb into Karen Sandrick's office and showed Zarb a September 13 letter from the Union. Medlen

asked if Zarb had authorized the Union to use her name and if Zarb gave her name to the Union to be on the organizing committee.

On September 18 Medlen told Zarb that she could not be in charge (acting supervisor) that day or ever again, because it would be a conflict of interest because Zarb represented the Union.

LIS Coordinator Nancy Medlen testified that she was acting director in the laboratory during a time in 1993. She learned of Rickie Zarb's involvement with the Union on September 14, 1993. On September 15 Medlen showed a union letter to Rickie Zarb and asked for Zarb to verify that she did indeed approve having her name listed on the union organizing committee. Zarb replied, "yes."

Medlen admitted that after discussing the matter with management, she talked with Zarb again on September 18 or 19. Medlen told Zarb that it had been determined that the acting supervisor (in charge) position presented a conflict of interest with her role on the union organizing committee and that Zarb would no longer serve as acting supervisor.

## 1. Discussion

I found that both Zarb and Medlen appeared to testify to the best of their recall. I was impressed with the demeanor of both Zarb and Medlen and I credit their testimony. Zarb is still employed by Respondent and, in view of the events here having a direct impact on Zarb's welfare, I feel that her recollection may be somewhat sharper than Medlen. There does not appear to be any significant conflicts between Zarb and Medlen, but to the extent there were any, I credit Zarb over Medlen.

## 2. Findings

I find, in view of the full record, that Rickie Zarb was told by Nancy Medlen that she would no longer serve as acting supervisor because of her inclusion on the union organizing committee. In light of that fact and my findings below, I find that action constitutes a violation of Section 8(a)(1) of the Act.

*B. Marsha Mason Threatened Employee with Loss of Benefits and Told Employees that an Attempt to Unionize Would be Futile*

Delores Tyrone testified that she is employed by Respondent as a registered nurse. Tyrone recalled there were two staff meetings during the summer of 1993, regarding the Union's organizing drive. Tyrone was at the first of those meetings for only a short time. In the second meeting, which was held by Marsha Mason, Tyrone recalled that Mason said that as to benefits everybody would start at ground zero if the Union came in. On cross-examination Tyrone said that Mason did not say anything about bargaining when she said benefits would start at ground zero. She also denied that Mason ever told the employees that they could get more, stay the same, or get less from bargaining. Tyrone denied that Mason said benefits would be frozen.

One of the employees with about 18 years of service asked about her pension and Mason responded to the employee that she may lose her pension. Tyrone recalled around that time the Respondent was saying they could not handle more staff because of budget problems. The employees asked Mason

how would the hospital handle increased benefits or increased staff if the Union came in. Mason replied there was a possibility of people having to be let go. Mason told the employees there would be money out of pocket if the employees went out on strike and they would lose their time in the hospital, would lose their benefits and there was a possibility their jobs would not be there when the strike was over. Mason said that "if you are out on strike you don't get paid."

Registered Nurse Scarlette Rockey testified that she attended one of two meetings held by Respondent in regard to the 1993 union organizing campaign. That meeting was the first of June 1993. Marsha Mason held the meeting. Mason told the employees that this particular union had no experience with health care professionals. Mason said the employee benefits would be canceled and would be renegotiated; that flexibilities in scheduling would be changed and controlled by the Union; and that when the Union came in there would be layoffs. Rockey denied employee benefits were discussed against a background of give and take in negotiating.

Registered Nurse Terry Tauferner testified about two staff meetings in the summer of 1993 in which the Union was discussed. Marsha Mason presided and there were 8 or 10 employees present. Mason told the employees that if the Union came in, they would lose all their benefits and have to start from scratch or zero. Mason said the benefits would have to be frozen. Also that the hospital could not afford the Union and because of that they'd possibly have to lay people off.

Nurse Manager Marsha Mason attended a nurse manager meeting on July 27, 1993. When she returned to her staff, she held a meeting. She showed the employees a recent letter from William Crone and asked if they had questions. One of the employees mentioned that her benefits had been greatly improved when a union came in at an earlier job she had. Mason responded that she was fortunate it had worked that way but that was not always the way the processes occurred. Mason told the employees that sometimes there could be more or less, as far as benefits, or they could stay the same with negotiation and a contract. She made it clear that she was against the Union. She testified that she told her staff that since they had been notified officially of the union campaign that all the employees' benefits had been frozen for the most part with a few exceptions. She explained if there is historical data saying that at a certain time we do a merit increase then that could be allowed to occur. The staff had questioned whether they could get their raises in October. Mason also told the employees that in a previous occasion it took 13 months for the union organizational campaign to come to a vote. She told the employees that it may not take that long or it may be longer and until that point things were frozen other than the exceptions. She told the employees that Respondent would bargain with the Union if it was elected.

Mason said that once negotiations begin "you don't start with what we have right now as far as benefits or wages go. We start with a blank sheet of paper and you build from there . . . but you start with nothing and you build from there. But at that point, everything is frozen until the contract is signed." Mason stated there was only so much money available and she used the example of a bucket. She said there is however much in the bucket for benefits and sometimes you readjust but the compromise may be losing staff positions in order to give more in the benefits.

Barbara Messmer testified that she was present during the meeting when Marsha Mason discussed the letter from Respondent's president, William Crone. She did not recall anything being said about losing benefits. She recalls that benefits were to stay the same unless changed by bargaining.

Mason testified that she was sure that Scarlette Rockey was not at that meeting on July 27. Barbara Messmer was asked who was present and, among others, she named Scarlette Rockey and Terry Tauferner. Messmer testified that nothing was said to make her believe it would be futile to select the Union.

In an earlier meeting Mason told the employees that the hospital had to be factual in its information to the employees but the unions aren't quite as rigid and unless you get it in writing it's not a guarantee that they can provide what they promise.

Mason admitted having a conversation with Dee Tyrone and Laura Clancy in the coffee room. Patty McIlaney and Barb Messmer came in and Terry (Tauferner) came in and became vocal about when a union tried to come in 3 years before he had received personal promises that were not kept.

Marsha Mason admitted that she brought up solicitation for the Union at a staff meeting in September 1993.

### 1. Discussion

There is a clear distinction between the testimony of Tyrone, Rockey, and Tauferner and that of Marsha Mason. Mason admits much of what was included in the others' testimony. Mason recalled however, that she tied change in benefits to bargaining, explaining that in collective bargaining the employees could lose, retain, or even increase benefits with the caveat that they could not exceed what was in the "bucket" and gains in one area would necessitate losses in another. Tyrone, Rockey, and Tauferner, on the other hand, recalled that Mason did not connect the threatened losses to the collective-bargaining process. At another extreme from Tyrone, Rockey, Tauferner, and Marsha Mason was Barbara Messmer. Messmer did not recall that Mason threatened losses of benefits under any circumstances.

There was a conflict between Marsha Mason and Barbara Messmer as to which employees were present at one of the meetings. Messmer's testimony was similar to witnesses for General Counsel and I credit Messmer to the extent she agrees with Scarlette Rockey as to Rockey's presence in a meeting with Marsha Mason. In other regards, however, I found Messmer's testimony to be incredible on the basis of her demeanor and her disagreement with all the other witnesses. Messmer did not recall Mason saying anything about losing benefits.

Respondent also argued that the testimony by General Counsel's witnesses is inconsistent because they occasionally talked about all benefits being at a standstill and on other occasions talked about benefits being lost. I find that does not show inconsistencies. Even Marsha Mason recalled talking about a freeze (referring to the campaign) and possible loss of benefits.

I was impressed with the testimony of Tyrone, Rockey, and Tauferner in light of their demeanor and the full record. The differences in the testimony of the witnesses for General Counsel and those for Respondent appear to be minor. There were important differences however, in the respective testimony. Mason recalled that she explained in detail that while

wages and benefits were frozen during the campaign which may last 13 months; that it would only be during negotiations that some benefits may be reduced or increased.

I am convinced that Mason did talk about a freeze and about what would occur if the Union came in. I am convinced, however, from the testimony of Tyrone, Rockey, and Tauferner that she did not logically connect the freeze with the campaign and the possible loss of benefits with bargaining, as she did during her testimony. Tyrone, Rockey, and Tauferner recalled that Mason did not couple her threats with negotiations. I find that Mason's comments were not linked to the campaign and, separately, to negotiations in the way she connected those events during her testimony. Tyrone and Rockey were asked and specifically denied that Mason based her projection of starting at ground zero on bargaining. Their recollection was that she told them they could lose benefits if the Union came in.

Tyrone, Rockey, and Tauferner all remain employed by Respondent and all testified against Respondent's interest. I credit their testimony. There were errors which may have been due to the witnesses not being present throughout the conversations. In that regard, I believe that Tyrone was mistaken when she testified that Mason said nothing about benefits being frozen.

## 2. Findings

I find that the employees were threatened that if the Union was selected their benefits could be reduced to zero, pension rights and flexibility in scheduling could be lost, and some employees may be laid off. Mason also indicated that election of the Union would be futile because there was only a bucket of benefits and if there were improvements in one area, there would be reductions in others. I find that Mason's comments constitute threats as to what could happen if the employees elected the Union in violation of Section 8(a)(1). *Belcher Towing Co.*, 265 NLRB 1258, 1268 (1982); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980); *Madison Kipp*, 240 NLRB 879 (1979).

### *C. Respondent Has Denied Employee Rickie Zarb Opportunity to Act as Assistant Supervisor*

Rickie Zarb testified that she is employed by Respondent as a medical technologist III.

Zarb has worked for Respondent for approximately 7 years. Her pay is \$18.43 per hour. Zarb testified that she works 10 hours a day, 4 days a week from 1 to 11:30 p.m. Her supervisor is Doris Waller who is a medical technologist ASCP. In September 1993, Doris Waller reported to Karen Sandrick, laboratory director. Sandrick reported to Plama Fuson, vice president. Sandrick had two assistant supervisors, Carol Jacobson and Brian Reschke.

Zarb was active in the Union's campaign to organize Respondent's employees. She learned of the union campaign in August 1993. She attended four union meetings. Zarb was a member of the union organizing committee and she was listed as a member of that committee in a September 13, 1993 letter the Union sent Respondent. Respondent received that letter on September 14.

As shown above, Zarb testified that Acting Laboratory Director Medlen showed Zarb the Union's September 13 letter and asked if Zarb had authorized the Union to use her name.

Medlen asked if Zarb gave her name to the Union to be on the organizing committee. On September 18 Medlen told Zarb that she could not be put in charge because it would be a conflict of interest because Zarb represented the Union.

LIS Coordinator Nancy Medlen testified that she was acting director in the laboratory during a time in 1993. She learned of Rickie Zarb's involvement with the Union on September 14, 1993. On September 15 Medlen showed the letter to Rickie Zarb and asked for Zarb to verify that she did indeed approve having her name listed. Zarb replied yes.

Medlen admitted that after discussing the matter with management, she talked with Zarb again on September 18 or 19. Medlen told Zarb that it had been determined that the acting supervisor position presented a conflict of interest with her role on the union organizing committee and that Zarb would no longer serve as acting supervisor.

Around September 21 Karen Sandrick told Zarb she was surprised and disappointed in Zarb because of the Union's September 13 letter. Zarb replied that she was interested in the Union for the benefits and job security. Sandrick told Zarb she felt Zarb was making a mistake.

Karen Sandrick admitted that she was "surprised and disappointed" when she was informed that Zarb's name was in the Union's letter. She admitted that she called Zarb into the office and expressed her disappointment.

The 2-week work schedule had already been published when Medlen told Zarb on September 18 that she could not be in charge (acting supervisor). According to that schedule Zarb was scheduled to be in charge on Sunday, September 24. Zarb was reassigned and employees Jane Hawkins and Jim Krump were placed in charge that day. Since that time Zarb has not received an in-charge (acting supervisor) assignment.

During the time Zarb was in charge (acting supervisor), there were supervisors in other departments.

On weekends as well as other times when the shift supervisor was not on duty, the supervision in the laboratory would rotate among a group. Those employees were mostly medical technologists. Two of the five or seven employees that rotated to "in charge" were Assistant Supervisors Carol Jacobson and Brian Reschke. The others were not supervisors.

Rickie Zarb testified that while she was in charge, she did not have the authority to interview job applicants. She could permit employees to leave early and she could reassign work within each employee's job description. She did not have that authority on days when she was not in charge. She did not handle the timecards and she did not have access to personnel records. She did not have authority to purchase items on the hospital's credit.

Zarb filled out incident reports as part of her duties while she was in charge. Although she did not have authority to discipline employees, some employees were disciplined on the basis of what was in the incident report.

Zarb did not attend supervisory meetings. When she was in charge on weekends the workload was lighter than during a normal weekday.

Rickie Zarb could not inspect work quality when she was in charge. She could report rules infractions, but she could not discipline an employee. She could report rules infractions during her normal duty. She continued to perform her normal duties on those occasions when she was in charge. Zarb esti-

mated that her normal duties would require 95 percent of her time and 5 percent of her time would be on in charge duties on those occasions when she was in charge.

Karen Sandrick testified that she is now a corporate planner for CHC which is the parent corporation of the hospital. Until November 1993, Sandrick was director of the laboratory. Sandrick introduced the career ladder concept to the lab. A similar program was in place in nursing.

Karen Sandrick was away during August and September 1993. Nancy Medlen was in charge of the laboratory during that period. When Sandrick returned to the hospital she was told about Rickie Zarb's inclusion on the Union's organizing committee. At that time Zarb was the chair of the career ladder committee. Sandrick reviewed Zarb's role on the career ladder and her "supervisory position" and decided there was no conflict in the career ladder position but that there was a conflict of interest "because of the managerial types of things (Zarb) was responsible for on the weekends on the 3-11 shift."

During the hearing Sandrick reviewed the job description and performance standards of the shift supervisor. Sandrick testified that the acting shift supervisor was charged with the duties specified in paragraphs 1, 2, 3, 5, and 9 of the job description and performance standards for the shift supervisor position:

## II. MAJOR RESPONSIBILITIES AND PERFORMANCE STANDARDS:

1. Provides direct supervision to the section or shift, coordinating workflow and scheduling staff to provide adequate coverage and efficient use of personnel.
2. Performs technical bench work to provide adequate coverage as workload fluctuates.
3. Maintains and troubleshoots instrumentation to include routine operation as well as failures. Resolves all problems and communicates with other shifts concerning status of downtime.
5. Complies with basic hospital policies, rules, and safety regulations. Practices good guest relations.
9. Communicates clearly and gives assistance to employees, and other supervisors, and all healthcare professionals in an effective and timely manner.

Those items in the job description and performance standards for shift supervisor, that were not included in Karen Sandrick's outline of acting supervisor duties included:

4. Evaluates job performance of employees in section or shift by annual performance appraisal. Counsels employees following hospital procedures in an effective manner when disciplinary action is necessary.
6. Maintains inventory of all needed reagents and supplies in a cost effective manner. Provides input for selection of vendors.
7. Plans and coordinates orientation and training of new employees and students in conjunction with Education Coordinator. Provides intertraining of all shift personnel to insure adequate availability of trained staff.
8. Attends all hospital and laboratory meetings as directed. Attends workshops and training programs as di-

rected to acquire advanced skills. Communicates information gained to staff via inservice programs.

10. Completes special projects as assigned by Administrative Director.

Sandrick testified that the position of acting supervisor was discussed with would be candidates for the job and, if the person "did not want to accept the responsibilities, there was no pressure put on those individuals to assume those responsibilities." Acting supervisor was rotated among the people that were interested in those duties. Sandrick testified that employees called the acting supervisor when they could not report for work. The acting supervisor was not responsible for the entire work assignments on that shift. Adjustments in work assignments would be made through the actual supervisor.

Acting supervisors did have authority to send employees home. If there was a malfunction of an instrument the acting supervisor would be responsible for calling a repairman, diverting the work to another instrument or locating a courier to take the materials to another institution to perform the test on behalf of the hospital.

Additionally, the acting supervisor would contact a pathologist when one was requested by another physician.

If a complaint was filed, the acting supervisor would be responsible for thorough investigation which could include visiting with the patient to insure the problem had been corrected. The acting supervisor would then prepare a report called a variance report which would be sent to the Risk Management Department. Also if there was a problem in the laboratory such as with handling a specimen, the acting supervisor would be consulted and asked to sign the report. The acting supervisor did not have authority to discipline an employee even though a report signed by the acting supervisor could lead to discipline.

## 1. Discussion

I find that the cumulative testimony illustrated that Respondent did deny Rickie Zarb the opportunity to act as assistant supervisor because of her inclusion on the union organizing committee. As shown above, I find that Zarb was a credible witness in view of her demeanor and the full record. Moreover, I note that her entire testimony was substantially corroborated by witnesses for Respondent.

## 2. Findings

As to the alleged violation of Section 8(a)(1) by denying Rickie Zarb continued acting supervisory assignments, I shall first examine whether General Counsel proved a prima facie case. *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The record established that Zarb engaged in union activities. The record shows that Zarb was on the union organizing committee and Respondent learned of that on September 14, 1993.

The record also proved Respondent's union animus to its employees' union activities. As shown above, Respondent engaged in 8(a)(1) violations by threatening its employees because of their union activities.

Moreover, where, as here, the alleged basis for the action against an employee is protected union activity, the Board and courts have found the action of the employer to be inherently destructive of Section 7 rights. *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967).

Respondent's alleged grounds to withhold acting supervisor assignments to Zarb was her inclusion on the Union organizing committee. Such activity is protected union activity.

The record failed to show business justification for Respondent's action against Zarb. She was told that there was a conflict of interest in a member of the union organizing committee serving in the position of acting supervisor. There was no credited evidence, however, proving an actual conflict existed. The duties of acting supervisor, as noted herein, did not show an inherent conflict of interest. Karen Sandrick testified there was a conflict "because of the managerial types of things (Zarb) was responsible for on the weekends on the 3-11 shift." There was no showing, however, of how those "managerial types of things" would conflict in interest with the duties of a member of the Union's organizing committee.

I find that General Counsel proved, prima facie, that a motivation for Respondent action against Zarb was Zarb's protected union activity, i.e., her inclusion on the union organizing committee. *Electromedics, Inc.*, 299 NLRB 928 (1990).

Respondent argued that despite Zarb's inclusion on the union organizing committee, it was not forbidden by the Act from refusing her the acting supervisor assignments, because that is an unprotected position.

That question has been considered before:

Under Section 2(3) of the act "employee" as defined does not include foremen or other supervisory personnel; and, it is urged, the denial of a supervisory position is for that reason not within the protection of the Act. But, even if we assume, *arguendo*, that an applicant for a supervisory position who was not already an employee of this particular employer would not have been a protected employee under the Act, it does not follow that Finch was similarly not protected. At the time the discrimination took place he was clearly a protected employee, and his prospects for promotion were among the conditions of his employment. The Act protected him so long as he held a nonsupervisory position, and it is immaterial that the protection thereby afforded was calculated to enable him to obtain a position in which he would no longer be protected. [*NLRB v. Bell Aircraft Corp.*, 206 F.2d 235, 237 (2d Cir. 1953).]

Respondent contended that the acting supervisor position is a supervisory position as defined in the Act. General Counsel pointed to *United Exposition Service*, 300 NLRB 211 (1990), as illustrating that Zarb's activity was protected if acting supervisor is a supervisory position. General Counsel also argued that the position of acting supervisor is not a supervisory position as defined in the Act.

In *United Exposition Service*, the employer stopped using an employee as supervisor on out of town work because of the employee's action while on a picket line. The Board affirmed Administrative Law Judge Leiner's finding that the employee was engaged in protected activity and that the employer engaged in unlawful conduct by refusing to continue to use the employee as an out of town supervisor. Judge

Leiner found that the employee engaged in protected activity while an employee as opposed to the situation in *Parker Robb Chevrolet*, 262 NLRB 402 (1982), where the alleged discriminatee was discharged because of actions in his role as a supervisor.

Here there was no contention that Rickie Zarb engaged in union activities in her role of acting supervisor. She was denied that job because she was listed as a member of the union organizing committee. Therefore, under the reasoning of *United Exposition Service*, her conduct was protected and Respondent, by refusing to continue to assign her work as acting supervisor, engaged in unlawful discrimination because of her union activity:

In view of the above-cited precedents, therefore, I conclude that Respondent's discriminatory failure to reappoint Gibson to the position of out-of-town supervisor, a reappointment which Respondent had historically followed over a 9-year period, interrupted only because of Gibson's protected union activities as an employee, violated Section 8(a)(3) and (1) of the act. In reaching that conclusion, I further conclude that the failure to reappoint him as a supervisor occurred while Gibson was an *employee* and on account of lawful union activity in which he engaged as an employee. Therefore the discrimination violated his rights as an *employee*. [*United Exposition Service*, 300 NLRB 209, 222 (1990).]

Respondent argued the instant matter must be distinguished from *United Exposition*, because that case involved the employee in question being assigned to temporary supervisory positions at other locations. Here Zarb was assigned at the same hospital where she performed her nonsupervisory duties.

To the issue of loyalty I am unable to see that it would make any difference whether the supervisory positions are at one location or another. I find that Respondent failed to make a case that Zarb would compromise her loyalty to Respondent by being on the union organizing committee. I find that *United Exposition* is applicable to the instant situation.

Moreover, in the instant situation, there is a question about whether the job of acting supervisor was actually a supervisory position. Respondent in arguing that it was a supervisory position pointed to *Canonie Transportation Co.*, 289 NLRB 299, 300 (1988), on the contention that where one performs both supervisory and nonsupervisory duties, the Board applied the "regular and substantial test."

Respondent argued that health care never sleeps and that it must have absolute loyalty with no possibility of conflict compromise from its supervisory designates at all times. It was for that reason that Zarb was removed from the acting supervisor position.

Section 2(11) of the Act provides:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not a merely

routine or clerical nature, but requires the use of independent judgment.

Rickie Zarb admitted that she was responsible for investigating incidents and preparing reports. She could permit employees to leave early and she could reassign employees to jobs within their job description. She received an additional \$.75 an hour when serving as an acting supervisor. Acting supervisors were responsible for insuring they had an adequate staff. Staff members could be called in or required to stay overtime. However, the acting supervisor could not grant overtime pay. The acting supervisor was required to prepare incident reports and to communicate with appropriate officials. In the event of a malfunction the acting supervisor was responsible for calling a repairman and diverting the work to avoid the malfunction and, if necessary, locating a courier to take the materials to another location to perform necessary tests. When a physician requested a pathologist the acting supervisor was required to locate one. During weekends the acting supervisor was the only person with authority in the laboratory. There were supervisors in other departments within the hospital.

Before September 14, 1993, Zarb had averaged 31 to 35 acting supervisor assignments each year.

The acting supervisor did not attend supervisory meetings. The acting supervisor lacked authority to interview job applicants. The acting supervisor was not responsible for time cards and did not have access to personnel records.

The acting supervisor did not inspect work quality or discipline employees. Zarb estimated that she spent 95 percent of her time as acting supervisor, engaged in her regular duties as a medical technologist III.

The duties of the acting supervisor appear routine in nature. Rickie Zarb did not perform functions that required independent judgment. Obviously, there is some discretion required in permitting employees to leave early and to call needed staff members into work. There was no showing, however, that Zarb had the discretion to do more than routinely phone unscheduled employees to fill vacancies or to do more than permit employees to leave early at their request. The other duties, calling repairmen or diverting lab test to other sources, preparing reports, and calling pathologists, are routine duties and require no independent judgment. In view of the above and the full record, I find that the job of acting supervisor was not a supervisory position.

On the basis of my finding above, I find that Respondent violated Section 8(a)(1) of the Act by refusing to continue to assign Rickie Zarb to the position of acting supervisor as it had done before September 14, 1993, due to her position as a member of the union organizing committee.

#### ADDITIONAL CONCLUSIONS OF LAW

Respondent violated Section 8(a)(1) of the Act by threatening its employees with loss of opportunity to be acting supervisor, with loss of benefits, with loss of pension, and with layoffs and by discriminatorily refusing to continue to appoint Rickie Zarb to the position of acting supervisor. Respondent thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent has illegally refused to continue to assign its employee Rickie Zarb to the position of acting supervisor because of her protected activities, I shall order Respondent to offer Rickie Zarb immediate reinstatement to her former position on a regular basis in the manner of her assignments before September 14, 1993. I further order Respondent to make Zarb whole with interest, for any loss of earnings she suffered as a result of the discrimination against her and that Respondent remove from its records any reference to the unlawful actions against Zarb, and notify her in writing that Respondent's unlawful conduct will not be used as a basis for further personnel action. Backpay shall be computed as described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

#### ORDER<sup>1</sup>

The Respondent, Naples Community Hospital, Inc., its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Threatening its employees with loss of benefits, with loss of pension, with layoffs, and with loss of assignment to acting supervisor because of their activities on behalf of Communications Workers of America, AFL-CIO, or any other labor organization.

(b) Refusing to assign employee Rickie Zarb to the position of acting supervisor because of Zarb's union activities.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer its employee Rickie Zarb full reinstatement to its position of acting supervisor in the manner of its practice before September 14, 1993, and make Zarb whole for any loss of earnings plus interest, she suffered by reason of its illegal actions.

(b) Post at its facility in Naples, Florida, copies of the attached notice.<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY THE ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid and protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten to refuse to assign our employees to acting supervisor because they engage in activities on behalf of Communications Workers of America, AFL-CIO, or any other labor organization.

WE WILL NOT threaten our employees with loss of benefits, with layoff, and with loss of pension because of our employees' activity on behalf of a labor organization.

WE WILL NOT refuse to assign our employees to acting supervisor because of our employees' union activities.

WE WILL offer full reinstatement to Rickie Zarb to her assignment of acting supervisor in the manner of her assignments on and before September 13, 1993.

WE WILL make Rickie Zarb whole for any loss of earnings she suffered by reason of our discrimination against her with interest.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed them by Section 7 of the Act.

NAPLES COMMUNITY HOSPITAL, INC.